IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 450 of 1990

For Approval and Signature:

HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

MANUBHAI SHIVALAL SHAH

Appearance:

1. Criminal Appeal No. 450 of 1990

MS HARSHA DEVANI, APP for Appellant No.

MR UA TRIVEDI for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 30/06/2004

ORAL JUDGEMENT

1. The State of Gujarat having been aggrieved by the order passed by the Ld. Metropolitan Magistrate, Court

No. 7, Ahmedabad, in Criminal Case No. 1997 of 1987 dated 17th April, 1990 granting benefit to the respondents under the Probation of Offenders Act [hereinafter referred to as 'the Act'], has approached this Court u/S. 377(1) of the Code of Criminal Procedure [hereinafter referred to as 'the Code'] for enhancement of the sentence.

2. The facts, in short, giving rise to the present prosecution are as under :-

2.1. According to the case of prosecution, the respondents got printed a fake octroi receipt book of series No. 4662 which was already used and exhausted. Respondents nos. 1 and 2 got the receipts book printed in the press of respondent no. 3. Respondents nos. 1 and 2 also got prepared the seal of the Ahmedabad Municipal Corporation. These receipts were used between the period 19th February, 1987 and 24th February, 1987 with a view to evade payment of octroi. These fake receipts with the seal of Ahmedabad Municipal Corporation were produced with a view to show that octroi was duly paid. Evasion of payment of octroi was to the extent of Rs.43,688/-. Thus, they had committed offences made punishable under sections 420, 467 and 114 of the Indian Penal Code [hereinafter referred to as 'IPC'].

2.2. During the pendency of the proceedings, the respondents preferred application seeking discharge from the case and that application was partly allowed and the respondents were discharged of the offence made punishable u/S. 467 of the IPC. Subsequently, the respondents pleaded guilty to the charge u/S. 420 of the IPC. The Ld. Magistrate, considering the circumstances on record, thought it fit to grant the benefit under the Act to the respondents and for that report of the concerned Probation Officer was called for. After due inquiry, the Probation Officer submitted report which favoured the respondents. The Ld. Magistrate also considering the fact that the respondents were of advanced age and the burden of maintaining the families was on them, granted them probation u/S. 4 of the Act. It is this order which is sought to be challenged by the State Government in this appeal.

3. It is by now a well established proposition of law that probation is not the sentence which is awarded after recording the conviction of the concerned accused. In view thereof, no appeal u/S. 377 for enhancement of the sentence could be filed against such order. The Apex Court in a decision rendered in the case of State of

Uttar Pradesh v/s. Nand Kishore Misra reported in AIR 1991 S.C. p.763, has categorically laid down as under :-

> "Where the convict was released on probation under S. 4 of the Probation Act, by the Magistrate, the appeal against release would lie to the Sessions Court in view of provisions of S. 11(2) of the said Act and appeal to the High Court under S. 377(1) of the Cr.P.C. would not be competent. The plain language of S. 377(1) of Cr.P.C. makes it clear that the State Government can file an appeal to the High Court "against the sentence on the ground of its inadequacy". In a case where the conviction is recorded by the trial Court but instead of awarding sentence of imprisonment the convict is released on probation under the provisions of the relevant special law then it is a case where no sentence at all has been awarded and as such the provisions of S. 377(1) are not attracted."

Thus, in the instant case there is no order of sentence passed against the respondents. Therefore, the State could not have approached this Court u/S. 377(1) of the Code.

4. The second aspect of the matter is that even otherwise also under the provisions of the Act, appeal would not lie before this Court in view of section 11(2) of the Act. The said provision provides that the appeal should be preferred before the Court where appeal against order of conviction and sentence would ordinarily lie; meaning thereby that in the instant case, the appeal would lie before the Court of Sessions and not before the High Court had there been any order of sentence passed against the respondents. On that count also the appeal is not competent.

5. In view of the above, this appeal has no merit and it is required to be dismissed. Appeal dismissed.

[AKSHAY H. MEHTA, J.]

* Pansala.